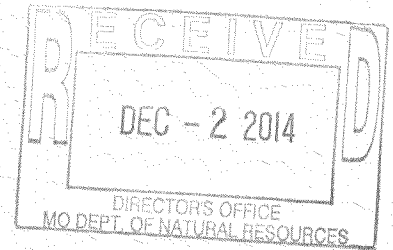


**BEFORE THE
SURFACE TRANSPORTATION BOARD**



AB-33 (SUB-NO. 164X)

**UNION PACIFIC RAILROAD COMPANY
-ABANDONMENT EXEMPTION-
IN BONNE TERRE, MISSOURI**

PETITION TO REOPEN

Gregory Evans
Laura G. Brys
Integer Law Corporation
633 West Fifth Street
Floor Sixty Seven
Los Angeles, California 90071
Telephone: (213) 627-2268
Facsimile: (213) 627-2579
E-Mail: gevans@integerlegal.com
E-Mail: lbrys@integerlegal.com
Attorneys for ASARCO LLC

Dated: November 24, 2014

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I. INTRODUCTION

In this Petition, Asarco LLC ("Asarco" or "Petitioner") seeks to Reopen the Abandonment Exemption proceeding in Docket No. AB-33 (Sub-No. 164X) filed by Union Pacific Railroad Company in Bonne Terre, Missouri. In that proceeding, Union Pacific Railroad Company ("Union Pacific" or "UP") sought and received authority to abandon 1.1 miles of rail line near Bonne Terre, Missouri, after representing to the Surface Transportation Board ("STB" or "Board") that there would be no detrimental effects on public health and safety.

New evidence shows a changed circumstance in that this statement by Union Pacific was false when it was made, that this Board should address by granting this Petition to Reopen. Given the materiality of this misrepresentation, the Board should investigate when Union Pacific knew, or should have known, of the detrimental effects on public health and safety and issue the appropriate remedies to help protect the public and the environment, while concurrently

preserving the integrity of the Board's regulatory processes and the nation's transportation policies.

This new evidence surfaced after Asarco commenced a civil action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675, ("CERCLA") for contribution and cost recovery against Union Pacific for costs and damages incurred at the Superfund site located in Southeast Missouri ("Site" or "SEMO"). Asarco paid approximately \$80 million in the bankruptcy to settle all of its CERCLA-related liability at the Site, including response costs and natural resource damages. Bonne Terre, Missouri is the SEMO sub-site where new evidence surfaced, showing that the Union Pacific line at issue in the above-captioned proceeding was constructed with mining waste, or chat, and was releasing harmful metals into the environment before and after the abandonment proceeding at issue had commenced. Indeed, contrary to UP's representation to the STB – that there are no detrimental effects on the public health and safety – the releases of hazardous substances continue to this day.

As such, Asarco presents this new evidence and requests that the STB reopen the abandonment proceeding to rectify UP's misleading representations in its notice. Based upon the new evidence, Asarco further requests that any abandonment of the Line should only be allowed subject to proper sampling and other environmental monitoring conditions that the STB deems appropriate, in addition to provision of a report by UP regarding the environmental condition of all other abandoned lines in SEMO acquired by UP in the Missouri Pacific acquisition. Reopening the proceeding will maintain the integrity of the STB's regulatory processes and obligations, and its authority to advance national policy for a safe national transportation system, while protecting public health and safety.

II. BACKGROUND

A. The STB Proceeding

On November 30, 2000, Union Pacific filed a Notice of Abandonment Exemption with the STB in Docket No. AB-33 (Sub-No. 164X) ("Notice") for 1.1 miles of the Bonne Terre Industrial Lead in Bonne Terre, St. Francois County, Missouri ("Line"). (See Declaration of Gregory Evans ("Evans Decl."), Ex. A.)

Union Pacific also filed its Combined Environmental and Historical Report ("Combined Report") with the Notice. (*Id.* at ASARCOSEMO00028397-28403.) Importantly, the Combined Report states there are no "known hazardous material waste sites or sites where known hazardous material spills have occurred at or along the subject right-of-way." (*Id.* at ASARCOSEMO00028402.) The Combined Report further states "[t]here are no anticipated adverse effects on water quality" and "...no known adverse environmental impacts." (*Id.* at ASARCOSEMO00028403.) The Notice was verified by Raymond E. Allamong, Jr., Manager-Rail Line Planning for Union Pacific. (*Id.* at ASARCOSEMO00028402.)

On December 8, 2000, the STB entered an Order, stating that "[p]ursuant to the provisions of 49 CFR 1152.29(e)(2), UP shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line." (See Evans Decl., Ex. B at ASARCOSEMO00028446.)

On January 21, 2001, Union Pacific exercised the abandonment exemption and served its Notice of Consummation on January 23, 2001. (Evans Decl., Ex. C.)

On February 12, 2001, the STB entered a decision, finding:

...no environmental or historic preservation issues have been raised by any party or identified by the Section of Environmental Analysis. Accordingly, a Finding of No Significant Impact under 49 CFR 1105.10(g) will be made pursuant to 49 CFR 1011.8(c)(10).

It is entered:

1. Abandonment of the involved rail line will have no significant effect on the quality of the human environment and conservation of energy resources or on historic resources.

(Evans Decl., Ex. D at ASARCOSEMO28448.)

As explained in STB's Memorandum dated December 21, 2000, the finding of "no significant effect" was based upon the STB's conclusion in its Environmental Assessment that the "proposed abandonment will not significantly affect the quality of the human environment." (Evans Decl., Ex. E at ASARCOSEMO00028475.)

B. The New Evidence

The basis of the petition to reopen is that in the original proceeding and related decisions, the STB did not consider evidence from Union Pacific or anyone that showed the mining waste used to construct the Line was leaching hazardous materials into the environment. New evidence from Asarco's sampling completed last year shows just such a threat to human health and safety, and the environment generally.

Specifically, in November 2013, Asarco's consultants collected three samples along the abandoned line showing ongoing threats to human health and safety from the on-going leaching of metals from the Line (SB-2, SB-3 and SB-4). (Evans Decl., Ex. F.) Asarco's expert, Paul V. Rosasco, P.E., explained the meaning of these results in his expert report of January 27, 2014, stating:

nearly all of the railroad ballast chat samples obtained by Asarco from the Bonne Terre and Fredericktown sampling locations (Figures 2 and 4) contained lead and zinc at concentrations above their respective PECs¹ and all of the samples obtained from rail line ballast in the Bonne Terre area (Figure 2) contained cadmium at concentrations above its PEC....Therefore, chat in railroad ballast beneath active or abandoned rail lines presents a threat of release to the environment that has already impacted human health and safety. (Evans Decl., Ex. G at 16-17.)

¹ Consensus-Based Probable Effects Concentrations.

Mr. Rosasco also prepared a table summarizing these results, which illustrates that the lead, cadmium and zinc levels at the abandoned line in Bonne Terre well exceed recommended levels. (Evans Decl., Ex. G at Table 2.) Asarco has prepared a version of the map included by Union Pacific in its original Notice, depicting Asarco's sampling locations on the Line for the Board's consideration. (Evans Decl., Ex. H.) Asarco's sampling illustrates that the Line that Union Pacific abandoned in 2001 in Bonne Terre is adversely affecting the environment and threatens human health and safety. Thus, the STB's decision that the "[a]bandonment of the involved rail line will have no significant effect on the quality of the human environment" was made without the benefit of the "new evidence" – which was not reasonably available to anyone other than UP as the proper owner of the Line at the time of its abandonment. Instead, UP denied the existence of such adverse impacts to human health and safety and the environment in general to the Board, and the Board based their abandonment decision on that representation. This new evidence alone constitutes grounds for the STB to reopen its proceeding and select an appropriate remedy and conditions for abandonment of the Line that would protect human health and safety as well as the Board's integrity. Also, given UP's acquisition of Missouri Pacific and its lines throughout Southeast Missouri, it is appropriate given the egregiousness of this new evidence that UP provide a report regarding the environmental condition of all other abandoned lines in SEMO acquired by UP in its acquisition of Missouri Pacific.

III. THE BOARD MAY REOPEN PROCEEDINGS AT ANY TIME BASED UPON NEW EVIDENCE OR SUBSTANTIALLY CHANGED CIRCUMSTANCES

The Board may, at any time and on its own initiative, because of material error, new evidence, or substantially changed circumstances, reopen a proceeding under 49 U.S.C. § 722(c). Any interested party may petition to reopen and reconsider an action of the Board under regulations promulgated by the Board.

In abandonment cases, a petition to reopen an administratively final action must state in detail the respects in which the challenged decision involves material error, or is affected by new evidence or substantially changed circumstances. 49 C.F.R. § 1152.25(e)(4). Such a petition should be granted upon a showing that the challenged action would be materially affected by one or more of these criteria. 49 C.F.R. § 1152.25(e)(2)(ii). Here, Petitioner has met its burden and the petition to reopen and for other relief should be granted.

A petition to reopen may be filed at any time. *See Burlington Northern and Santa Fe Railway Company – Abandonment Exemption – In Washington, County, OR, AB-6 (Sub. No. 383X), 2001 WL 1659570 (Dec. 21, 2001 STB).* Indeed, there is no time limit on a petition to reopen an abandonment proceeding on the basis of newly discovered evidence. *Cf., Simmons v. ICC, 784 F.2d 242, 245-46 (7th Cir. 1985).*

Under these standards, new evidence showing that the railroad company had and still has leaching contaminants that threaten human health and safety satisfies the requirements under § 722. The materiality of the new evidence depends on a fact-specific inquiry as to the basis of each petition. *See Jost v. STB, 194 F.3d 79 (1999)* (reversing the STB decision denying landowners' petition to reopen a matter when petition stated that full-width sales had occurred to render right-of-way abandoned under federal law). As noted by the United States Court of Appeals for the District of Columbia, "the sale of full-width right-of-way would be material to

the Board's decision," concerning whether there was federal jurisdiction to maintain a trail on right-of-way no longer connected to the interstate railway system. Similarly, here, the leaching of contaminants from or along an abandoned line would be material to the Board's decision that abandonment would not adversely affect human health and safety, and well within the Board's jurisdiction to impose appropriate environmental conditions to protect the public and the environment.

As noted below, Petitioner provides reliable new evidence, which was not reasonably or readily attainable by the public, nor cumulative, to support its claims. Indeed, the new evidence related to this abandonment proceeding was not reasonably available to anyone, other than UP, at the time of the STB's actions in this proceeding, given at the time of the abandonment no one else had access to the property, which was then owned by Union Pacific. Importantly, not until long after the proceedings were final in this matter did this new evidence manifest itself – through expensive litigation, sampling of the property, and a detailed expert report. The STB's original decision in this proceeding lacked the new evidence that Union Pacific knew, or should have known, of the harm to public health and safety. Union Pacific's failure to disclose that the Line was constructed by mining waste, which was leaching hazardous materials into the environment, provided the very basis of the Board's decision to allow abandonment of the Line. This critical UP omission is exposed by the "new evidence" from Asarco's sampling in November 2013.

Accordingly, pursuant to the new evidence presented below, Petitioner requests that the Board reopen the proceeding, find that it does adversely impact human health and safety and issue appropriate remedies.

IV. THE STB SHOULD REOPEN THIS PROCEEDING BECAUSE PETITIONER'S NEW EVIDENCE SHOWS RELEASES OF HAZARDOUS MATERIALS ALONG THE SUBJECT RIGHT-OF-WAY

A. The New Samplings Relied Upon by Petitioner Establish the Release of Metals into the Environment

In November 2013, Asarco's consultants collected three samples along the abandoned line, SB-2, SB-3 and SB-4. (See Evans Decl., Ex. F.) Asarco's expert, Paul V. Rosasco, P.E., explained the meaning of these results in his expert report of January 27, 2014, stating:

nearly all of the railroad ballast chat samples obtained by Asarco from the Bonne Terre and Fredericktown sampling locations (Figures 2 and 4) contained lead and zinc at concentrations above their respective PECs and all of the samples obtained from rail line ballast in the Bonne Terre area (Figure 2) contained cadmium.

(Evans Decl., Ex. G at 17.)

This new evidence is precisely the type contemplated by the regulations that govern the reopening of STB proceedings, *i.e.* evidence that was not readily or reasonably available at the time of the underlying decision, that was clearly relevant to the STB's decision and its obligation to protect the integrity of its procedures in order to protect public health and safety for a safe and efficient national rail system. The new evidence shows there are elevated levels of harmful material stemming from the facts that: (1) the region referred to as the Southeast Missouri Lead District, which includes Bonne Terre, has elevated levels of arsenic, cadmium, cobalt, copper, lead, nickel, and zinc from the Mississippi Valley Type ore deposit found in the District; (2) the mines have been served by railroads since as early as 1859 to the present, moving such hazardous materials; (3) the railroad track ballast and sometimes the grades of the line were constructed using mining related waste materials, including chat (the waste of lead and zinc and also includes cadmium—all of which the Environmental Protection Agency ("EPA") has designated as hazardous); and (4) the erosion and dissolution of these materials from the railroad

track ballast has resulted in release, or threat of release, of these materials to surface water and sediment, resulting in harm to humans and particularly children. (Evans Decl., Ex. G at 15.)

Nearly all of the rail lines in St. Francois and Madison Counties are or were owned by Union Pacific or its predecessors (Evans Decl., Ex. G at Fig. 1 in Att. 3) and some are in use today by Union Pacific. Thus, UP has been fully aware of the hazardous materials in the area; and it is particularly troubling to the integrity of the Board's processes that UP would suggest there were no problems associated with health and safety, as UP had done in its representations to the Board during the expedited abandonment procedure.

Undoubtedly, UP was also aware of the fact that railroad track ballast and in some instances the grades of these railroad lines were constructed using mining-related waste materials, including chat, by all the railroads entering the mining districts in Missouri. (*See* Evans Decl., Ex. G at 9.) Mr. Rosasco personally observed the presence of chat/mining waste in the ballast of the rail beds and as fill material beneath railroad grades and within bridge abutments. (*See id.* at 10.) During his site visit, Mr. Rosasco also personally observed the erosion of that chat ballast and embankment fill from railroad lines and bridge abutments in St. Francois and Madison counties owned or previously abandoned by Union Pacific or its predecessors. (*Id.* at 19.)

The Asarco 2013 samplings also support the presence of chat/mining waste within the railroad ballast, embankment, and bridge abutment materials along active and abandoned rail lines in St. Francois and Madison Counties. Specifically, samples of railroad ballast obtained by NewFields in 2006 and Asarco in 2013 contained elevated levels of cadmium, lead and zinc. (*See* Evans Decl., Ex. G at 10-12.) Mr. Rosasco also noted that Asarco specifically collected samples of railroad ballast from property formerly owned by Union Pacific at the abandoned MR&BTRR rail line located adjacent to the Bonne Terre Tailings Site on City of Bonne Terre

property in St. Francois County. (*Id.* at 11.) In addition, a sample (SB-1) was obtained at a location on City of Bonne Terre property along this same rail line nearly 3,000 feet south-southwest of the tailings pile and analyzed for total and leachable metals. (*See id.* at 11.)

The results of both the NewFields and Asarco sampling of railroad ballast in St. Francois and Madison Counties detected the presence of elevated levels of cadmium, lead and zinc in the railroad ballast. (*Id.* at 10.) Nearly all of the lead results, most of the cadmium and one of the zinc results for the railroad ballast samples obtained by NewFields were elevated. (Evans Decl., Ex. G at 15.) Similarly, most of the lead results and many of the cadmium results for the railroad ballast samples obtained by Asarco also exceed EPA's risk-based level for industrial uses (EPA, 2013). (*Id.*) Mr. Rosasco also indicated that a comparison of the results of laboratory analyses of railroad ballast samples obtained by NewFields in 2006 (NewFields, 2007) and Asarco in 2013 and 2012 (Integer, 2012) to risk-based concentrations established by EPA and Missouri Department of Natural Resources ("MDNR") indicates that the presence of cadmium, lead and zinc poses a threat or potential threat to human health and the environment. (*See id.* at 14.)

In sum, nearly all of the railroad ballast chat samples obtained by Asarco from the Bonne Terre and Fredericktown sampling locations (*id.* at Figs. 2 & 4) contained lead and zinc at concentrations above their respective PECs and all of the samples obtained from rail line ballast in in the Bonne Terre area (*Id.* at Fig. 2) contained cadmium at concentrations above its PEC. (*Id.* at 17.) In contrast, none of the results from the "control" soil samples obtained in the Leadwood area (Figure 3) contained cadmium, lead or zinc above the Probable Effect Levels ("PELs"). (*Id.*) Therefore, chat in railroad ballast beneath active or abandoned rail lines presents a threat or potential threat of release to the environment.

B. The Metals Being Released from the Line Are Harmful to Human Health and the Environment

EPA has designated those substances being by the chat used to construct the Line, such as cadmium, lead and zinc, as hazardous. 40 C.F.R. § 302.4. EPA further indicated that when left exposed to the environment, the lead in chat can be a hazard to human health (EPA, 2012a); that chat particles can enter soil, surface water, groundwater, and air (EPA, 2012a). (Evans Decl., Ex. G at 13.) As explained in Rosasco's report, exposure to lead has been known to cause learning disabilities and damage the human immune, blood and nervous systems (EPA, 2012a) and that children are the most susceptible to these effects (EPA, 2012a). (Evans Decl., Ex. G at 13.) Thus, EPA has indicated that the presence of elevated levels of lead, cadmium and zinc have resulted in threats or potential threats to human health and the environment. (*See id.* at 14.)

The unregulated release of these substances is also harmful to the environment. A study by the U.S. Fish and Wildlife Service ("USFWS") determined that elevated residues of lead, cadmium and zinc were found in every biological form examined—algae, rooted plants, crayfish, mussels and fish (Schmitt and Finger, 1982). (Evans Decl., Ex. G at 18.) The USFWS study also found that most of the metals in surface water derived from mine tailings are transported in the solid phase, and concentrations (as well as mass) in the suspended load increase with surface water flow (Schmitt and Finger, 1982). (*Id.*)

A U.S. Geological Survey ("USGS") found that about half of the ground-feeding songbirds in the SEMO mining district contained toxic levels of lead in their blood and internal organs (USGS, 2013, and Beyer, *et al.*, 2013). (*See id.* at 18.) The results of this study indicate that chat in railroad ballast presents a potential threat of release to the environment. (*See id.*) This study found that soil lead concentrations in SEMO were well above those that would be considered hazardous based on ecological risk assessment guidelines. (*See id.* at 19.)

The results of Petitioner's samplings when explained by the reliable sources, such as EPA, USFWS and USGS, in Mr. Rosasco's report, buttress his conclusion that:

Based upon findings and data documenting extensive use of mining waste by Union Pacific Railroad predecessors in Southeast Missouri, based upon testing of that abandoned mining waste used as ballast showing very high levels of lead and other metals, and based upon visible erosion of track ballast, embankments and bridge abutments, it is very likely that materials used to construct the existing and abandoned rail lines in the St. Francois and Madison Counties area are contaminated and causing environmental impacts in the SEMO Site.

(See *id.* at 20.)

Mr. Rosasco's conclusions unequivocally support Petitioner's request to reopen the proceeding and allow abandonment of the Line subject to proper sampling and environmental conditions to ensure the protection of human health and the environment. Further, given the extensiveness of his report, it is also appropriate that STB require the UP's provision of a report regarding the environmental condition of all other abandoned lines in SEMO it acquired in the Missouri Pacific acquisition.

V. THERE ARE SIGNIFICANT NATIONAL TRANSPORTATION POLICIES THAT SUPPORT REOPENING OF THIS PROCEEDING

The transportation policies of the United States will be advanced by the reopening of this proceeding. The National Transportation Policy states, among other things, that it is the policy of the United States Government to promote a safe and efficient rail transportation system and to ensure the development and continuation of a sound rail transportation system. 49 U.S.C. § 10101. The National Transportation Policy, formulated by Congress, was further enacted, as stated in its own terms, "to govern the [STB] in the administration and enforcement of all provisions of the Act," and to act as "the yardstick by which the correctness of the [STB]'s actions will be measured." *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 87-88 (1957).

Unfortunately, as illustrated by Petitioner's new evidence, the Board's granting of the abandonment in this proceeding falls far short on that yardstick.

However, actions can be taken to render the appropriate decision regarding the abandonment of the Line. The Supreme Court has long emphasized that a federal agency, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretations and overturn past administrative rulings and practice. *Compare SEC v. Chenery Corp.*, 332 U.S. 194 (1947) with *FCC v. WOKO*, 329 U.S. 223 (1946). As such, the STB has a duty to exercise jurisdiction when "the over-riding interest of interstate commerce require it." *See Kalo Brick & Tile*, 450 U.S. 311, 320 (1981). The STB's duty here could not be clearer. To allow this decision, this abandonment, to stand based upon a foundation constructed with faulty evidence and material misrepresentations would be an injustice to the STB's precedent and the policies of this country. The reopening of this proceeding and the conditioning of this abandonment to ensure the advancement and protection of public health and safety would advance Congress' intent in enacting the National Transportation Policy.

CONCLUSION

Over a decade ago, Union Pacific took advantage of this Board's expedited procedures to dump 1.1 miles of track in Bonne Terre, Missouri. Years later, after paying tens of millions of dollars dedicated to the cleanup of Southeast Missouri, Asarco unearths the material fact that UP rail lines in SEMO—this Line in particular—is leaching metals, designated as hazardous substances by EPA, into the environment to the detriment of human health and the environment. This evidence cannot be ignored, and the previous decision cannot stand in the face of this new evidence. Petitioner's request to reopen the proceeding should be granted, and abandonment of the Line should only be allowed subject to proper sampling and all other steps necessary to

protect human health and the environment that the STB deems appropriate, in addition to provision of a report by UP regarding the environmental condition of all other abandoned lines in SEMO acquired by UP in the Missouri Pacific acquisition.

Respectfully submitted this 24th day of November, 2014.

By: 

Gregory Evans

Laura G. Brys

Integer Law Corporation

633 West Fifth Street

Floor Sixty Seven

Los Angeles, California 90071

Telephone: (213) 627-2268

Facsimile: (213) 627-2579

E-Mail: gevans@integerlegal.com

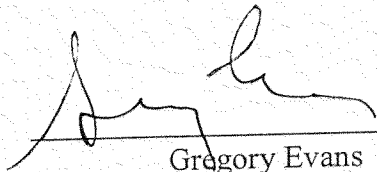
E-Mail: lbrys@integerlegal.com

Attorneys for ASARCO LLC

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Petition to Reopen by regular mail this 24th day of November, 2014, upon all parties of record on the STB's service list.

Type	Party Name	Address
Party of Record	Charles W. Saylor	1416 Dodge Street Room 830 Omaha, NE 68179-0001
Party of Record	Mack H. Shumate Jr.	101 North Wacker Drive Room 1920 Chicago, IL 60606-1718
Non-Party	Governor of Missouri	State Capitol Building Jefferson City, MO 65101-1556
Non-Party	Missouri Department of Natural Resources	P.O. Box 176 Jefferson City, MO 65102
Non-Party	Missouri Department of Transportation	105 West Capitol Avenue P.O. Box 270 Jefferson City, MO 65102
Non-Party	Missouri Public Service Commission	200 Madison Street Jefferson City, MO 65102-0360
Non-Party	Missouri State Clearinghouse	P.O. Box 809 Jefferson City, MO 65102
Non-Party	U.S. Army Corps of Engineers	601 E. 12th Street Room 736 Kansas City, MO 64106-2896
Non-Party	U.S. Department of Transportation Federal Motor Carrier Safety Administration	1200 New Jersey Avenue, S.E. Washington DC 20590
Non-Party	U.S. Environmental Protection Agency, Region 7	901 North 5th Street Kansas City, KS 66101
Non-Party	U.S. Fish And Wildlife Service	101 Park De Ville Drive, #A Columbia, MO 65203-0007


Gregory Evans